

MAY, Judge

Eric Alter was convicted after a jury trial of domestic battery, a Class D felony,¹ and invasion of privacy, a Class A misdemeanor.² Alter argues: 1) the court improperly denied his request for a mistrial; 2) the court admitted evidence that violated Indiana Evidence Rule 404(b); and 3) the court admitted evidence that violated the Court Order on Discovery and Trial Settings. We affirm.

FACTS AND PROCEDURAL HISTORY

Karen Alter (“Karen”) was previously married to Alter, and they had two children together. The children were ages 8 and 11 at the time of the trial. In early February, 2005, Karen obtained a protective order against Alter. Later that month, Alter refused to return the children to Karen. They were finally returned on March 16, pursuant to a court order.

On March 24, Karen arranged with Kelly Alter (“Kelly”)³ for the children to visit Alter for part of Easter weekend. The children were to be returned to Karen on Saturday, March 26, but a pick-up time was not specified. Karen called on Saturday to discuss getting the children. Alter agreed Karen could come and pick up the children. Karen, wary of going to Alter’s residence alone, contacted the Sheriff’s Department. Deputy Kevin Pruiett followed her to the residence. Karen entered Alter’s residence alone. She noticed the children were not present and their bags were empty. An altercation ensued

¹ Ind. Code § 35-42-2-1.3(b).

² Ind. Code § 35-46-1-15.1.

³ Kelly is Alter’s present wife, but they were not married at the time.

between Alter and Karen.⁴ Deputy Pruiett testified he could see into the residence and noticed there was a problem. He entered the residence and saw Alter hitting Karen's head on the floor. He pulled Alter off Karen and detained him.

On April 11, 2005, Alter was charged with one count of domestic battery, a Class D felony, and one count of invasion of privacy, a Class A misdemeanor. On February 26, 2007, the court granted the State's motion in limine seeking to exclude testimony that Karen's husband at the time of Alter's offense, Darrin Bogue ("Bogue"), was a convicted child molester.

On March 20, 2007, the morning of the trial, the court withdrew its grant of the State's motion in limine at Alter's request. At the same time, the court granted Alter's motion in limine to prevent the State from introducing evidence of Alter's bad temper. The court denied Alter's motion in limine to exclude evidence and a protective order was issued against Alter ten months after the offense. A jury found Alter guilty of both counts.

DISCUSSION AND DECISION

1. Denial of Alter's Request for Mistrial

Alter moved for a mistrial after the State asked Kelly, "Isn't it true that your husband gets upset when things don't go his way?" (Tr. at 340.) She did not answer the question before Alter objected on the ground the question violated his motion in limine regarding character evidence. The trial court denied Alter's request for a mistrial.

⁴ Karen testified Alter attacked her. Alter claimed he was acting to protect Kelly from Karen.

Mistrial is an extreme remedy in a criminal case and is reserved for situations where no other measures can rectify the situation. *Schlomer v. State*, 580 N.E.2d 950, 955 (Ind. 1991). The grant or denial of a mistrial is within the sound discretion of the trial court. It is reversed only on a showing of clear error, as the trial judge is in the best position to assess the surrounding circumstances and gauge the potential impact on the jury. *Szpyrka v. State*, 550 N.E.2d 316, 318 (Ind. 1990). To prevail on appeal, Alter must show “he was so prejudiced that he was placed in a position of grave peril to which he should not have been subjected.” *Schlomer*, 580 N.E.2d at 955. Whether Alter was put in a position of grave peril is determined by the “probable persuasive effect of the testimony on the jury’s decision.” *Id.*

A timely admonition to the jury is presumed to cure any prejudice. *Id.* at 956. In reviewing a denial of mistrial, we consider any admonition and its “curative effect to any prejudice that potentially was created.” *Van Orden v. State*, 469 N.E.2d 1153, 1159 (Ind. 1984), *cert. denied* 471 U.S. 1104 (1985).

The court sustained Alter’s objection and admonished the jury to disregard the question. As the witness did not answer the question and the court issued a timely admonition to the jury, Alter was not subjected to grave peril and the trial court did not abuse its discretion in denying the motion for mistrial.

2. Protective Order Evidence

Alter claims the trial court erred when it admitted evidence a protective order was issued against Alter ten months after the offense, as that evidence violated Indiana Evidence Rule 404(b).

The decision to exclude or admit evidence is within the trial court's discretion and is afforded great deference on appeal. *Pinkston v. State*, 821 N.E.2d 830, 837 (Ind. Ct. App. 2004). The exclusion or admission of evidence will generally not be reversed absent an abuse of discretion. *Id.* Abuse of discretion occurs when the decision is clearly against the logic and effect of the circumstances and facts before the court. *Hauk v. State*, 729 N.E.2d 994, 1001 (Ind. 2000).

Indiana Evidence Rule 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]

Rule 404(b) “prevents the State from punishing people for their character” by having a jury convict a defendant through a “forbidden inference” because he has committed other crimes. *Bassett v. State*, 795 N.E.2d 1050, 1053 (Ind. 2003).

In deciding whether character evidence is admissible under Rule 404(b), the court must: 1) determine whether the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the person's propensity to engage in a wrongful act; and 2) balance the probative value of the evidence against its prejudicial effect pursuant to Evid. R. 403.⁵ *Id.*; *Hauk*, 729 N.E.2d at 1001.

⁵ Ind. Evidence Rule 403 provides: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]”

The State invites us to find Alter waived this issue because his objection was inadequate. The objection was stated during this exchange between the State and Kelly:

STATE: When you requested your protective order, did you refer in your petition to an incident that happened around the time that [Alter] was arrested for domestic violence against Karen?

A: Not that I am aware of.

DEFENSE: Objection, Your Honor, I need to approach real quick.

COURT: You may.

[inaudible discussion]

(Tr. at 340-41.) The record is silent as to the specific ground for the objection and we will not presume from the silent record that Alter offered no specific ground for the objection. We accordingly decline to find this issue waived. *See Vertner v. State*, 793 N.E.2d 1148, 1153 n.5 (Ind. Ct. App. 2003) (declining to find either waiver or reversible error when record is silent).

The State next argues Alter placed his intent at issue when he raised the affirmative defense of self-defense in claiming to protect Kelly. This, the State asserts, allowed it to introduce character evidence that would otherwise be inadmissible. “Evidence of prior bad acts is relevant to negate a claim of contrary intent.” *Iqbal v. State*, 805 N.E.2d 401, 406 (Ind. Ct. App. 2004). Self-defense is a claim of contrary intent. *Goldsberry v. State*, 821 N.E.2d 447, 456 (Ind. Ct. App. 2005). Even so, the evidence of other bad acts must be relevant to whether Alter was acting in self-defense. *See Gillespie v. State*, 832 N.E.2d 1112, 1117 (Ind. Ct. App. 2005) (evidence must be relevant to defendant’s state of mind at the time of the alleged crime). The only element

of self-defense to which Alter's state of mind "might be relevant is his 'reasonable belief' *vel non* that he [or a third person] is being subjected to the imminent use of unlawful force and his 'reasonable belief' *vel non* that his own use of force is necessary to prevent serious injury to himself [or the third person]." *Id.* at 1117.

The protective order against Alter was not issued until ten months after the crime and it did not involve the victim of the crime. An act committed ten months after the alleged crime against someone other than the victim has no apparent relevance to Alter's state of mind at the time of the crime. As such, Alter's claim he was defending Kelly did not open the door to this evidence. Nor was this evidence relevant to any other matter at issue other than Alter's character. Therefore, the trial court erred under Rule 404(b) in admitting evidence of the subsequent protective order.

Having found error in the admission of evidence regarding the protective order, we must now determine the prejudicial impact of that evidence. *Johnson v. State*, 671 N.E.2d 1203, 1207 (Ind. Ct. App. 1996). "A trial error may not require reversal where its probable impact on the jury, in light of all of the evidence in the case, is sufficiently minor so as not to affect a party's substantial rights." Ind. Trial Rule 61; *Bassett*, 795 N.E.2d at 1054. "The erroneous admission of evidence is harmless when there is substantial independent evidence of guilt such that it is unlikely that the erroneously admitted evidence played a role in the conviction." *Johnson*, 671 N.E.2d at 1207.

The probable impact on the jury of the protective order was, in light of the other evidence, sufficiently minor that Alter's substantial rights were not affected. Only two questions were asked about the protective order, and Alter objected to one. Neither

question nor answer addressed the reason the protective order was issued. The protective order was issued ten months after the crime, and the remoteness in time between the incidents further diminishes any potential for prejudicial impact. *See Johnson*, 671 N.E.2d at 1208. A juror submitted a written question about the protective order,⁶ but the judge did not permit the witness to answer.

There was substantial independent evidence supporting Alter's convictions and disproving his claim he was defending Kelly. Deputy Pruiett saw Alter strike Karen's head against the floor multiple times. The erroneous admission of minimal testimony about the protective order, when the jury was not certain the order was against Alter, did not likely influence the verdict. Therefore, the admission was harmless error.

3. Timeliness of Phone Conversation Evidence

On the morning of trial the court withdrew its grant of the State's motion to exclude evidence Bogue was a convicted child molester. The State told the court and Alter it planned to offer into evidence a tape of a phone conversation between Alter and Karen from immediately before Alter attacked Karen. The State had not been able to offer the tape before the court changed its ruling because the tape referred to Bogue's status as a convicted child molester. When the State offered the tape into evidence, Alter objected because he had not received the tape until that morning. The court overruled Alter's objection.

⁶ The question read: "Was the Protective Order that Kelly had before against her ex-husband or [Alter]?" (Appellant's App. at 23.)

Alter argues the admission of the tape was a direct violation of the Court Order on Discovery and Trial Settings, and the late disclosure of the tape impacted his Sixth Amendment right to present a defense and was a *Brady* violation. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution”).

Our Supreme Court has re-affirmed the *Brady* rule but has stated when discovery of the evidence at issue occurs before the trial is concluded, “reliance on *Brady* is misplaced.” *Braswell v. State*, 550 N.E.2d 1280, 1283 (Ind. 1990) (a recorded phone conversation between a State’s witness and a detective that was turned over almost 2 days after she testified, but still during trial, did not fall under the *Brady* rule). Alter was made aware before the trial began the tape recording would be offered as evidence.⁷ Therefore, Alter cannot rely on *Brady*.

“The trial court must be given wide discretionary latitude in discovery matters since it has the duty to promote the discovery of truth and to guide and control the proceedings, and will be granted deference in assessing what constitutes substantial compliance with discovery orders.” *Kindred v. State*, 524 N.E.2d 279, 287 (Ind. 1988). “Where there has been a failure to comply with discovery procedures, the trial judge is usually in the best position to determine the dictates of fundamental fairness and whether any resulting harm can be eliminated or satisfactorily alleviated.” *Id.* at 286-287. Unless

⁷ The State presented the tape at a pre-trial hearing the morning of the trial.

there is clear error and resulting prejudice, we will not disturb the trial court's determination as to discovery violations. *Id.* at 287.

A continuance is usually the proper remedy when remedial measures are warranted. *Braswell*, 550 N.E.2d at 1283; *Fleming v. State*, 833 N.E.2d 84, 91 (Ind. Ct. App. 2005). “Failure to request a continuance, where a continuance may be an appropriate remedy, constitutes a waiver of any alleged error pertaining to noncompliance with the trial court's discovery order.” *Fleming*, 833 N.E.2d at 91. In Alter's case, the discovery non-compliance was not flagrant and deliberate, nor was it so misleading or in such bad faith that the right to a fair trial was impaired. *See Braswell*, 550 N.E.2d at 1283. Nor did the prosecution negligently destroy or withhold material evidence. *Id.* In this case, a continuance would have been the proper remedy. Alter did not request a continuance, so he waived any alleged discovery error.

Waiver notwithstanding, Alter has failed to demonstrate admission of the tape recording was a fundamental error affecting his substantial rights.⁸ “The fundamental error exception . . . permits reversal when there has been a ‘blatant violation of basic principles’ that denies a defendant ‘fundamental due process.’” *Goodwin v. State*, 783 N.E.2d 686, 687 (Ind. 2003) (citing *Wilson v. State*, 514 N.E.2d 282, 284 (Ind. 1987)). To demonstrate fundamental error, a defendant must show he would suffer greater prejudice than from ordinary reversible error. *Purifoy v. State*, 821 N.E.2d 409, 412 (Ind.

⁸ Ind. Evid. Rule 103(d) allows review of fundamental errors not properly preserved.

Ct. App. 2005). The error must be so prejudicial to the rights of the defendant that a fair trial is no longer possible. *Baird v. State*, 688 N.E.2d 911, 917 (Ind. 1997).

The introduction of the tape recording as evidence, even if it slightly prejudiced Alter, was not such a denial of fundamental due process as to require reversal of Alter's conviction. The conviction was not based solely on this evidence, as there was eyewitness testimony regarding the crime. Alter has not shown the introduction of the tape recording as evidence made a fair trial impossible. Accordingly, the admission of the tape was not fundamental error.

Affirmed.

RILEY, J., and KIRSCH, J., concur.